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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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NO. A-453

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DOLPH BRISCOE, Governor of Texas and STEVEN C. OAKS, Secretary of State of the State of Texas

Petitioners

v.

FRANK ESCALANTE, FRANK MOORE, JOHN DILLARD, T. R. DILLARD, and MARY DILLARD

Respondents

* * *

JURISDICTIONAL STATEMENT

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SUBJECT INDEX

INDEX OF AUTHORITIES

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JURISDICTIONAL STATEMENT

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This appeal is from a judgment of the United States District Court for the Western District of Texas, entered on October 31, 1977, in an action challenging the districting for the election to the Texas House of Representatives in Tarrant County. The decision of the Court below holds that a new plan with a population deviation of approximately 2% based on 1970 census figures should be substituted for the existing apportionment which has a 7.7% deviation according to 1970 census figures. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The majority opinion, order, and dissenting opinion of the Court below are not yet reported. The majority opinion was issued on October 31, 1977, the dissenting opinion on November 3, 1977. The Order was entered on November 10, 1977. All are reproduced in the separately bound appendix. The opinion of the court entered on February 19, 1976, is reported at *Graves v. Barnes*, 408 F. Supp. 1050 (W.D. Tex. 1976). The apportionment order entered in 1976 and presently in effect in Tarrant County is reproduced in the separately bound appendix.

JURISDICTION

This is an appeal from an order of a three-judge federal district court entered November 10, 1977, adopting a new apportionment plan for state legislative seats in Tarrant County, Texas. Jurisdiction below was based on 28 U.S.C. §§1343 and 2281.

Notice of appeal from the lower court's order was filed on November 21, 1977. Application for a stay of the lower court's order was presented to Mr. Justice Powell, and, after referral to the full court, was granted by Mr. Justice Powell on December 5, 1977. Appellee's Motion for Rehearing was denied on December 12, 1977. The jurisdiction of this Court to review the judgment of the District Court on appeal rests on 28 U.S.C. §§1253 and 2101(b). Jurisdiction is supported by cases which required this case to be heard by a three-judge district court and recognize a direct appeal to this Court from the judgments thereof. *Chapman v. Meier*, 420 U.S. 1, 14 (1975); *White v. Regester*, 412 U.S. 755 (1973); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Skolnick v. State Electoral Board of Illinois*, 336 F. Supp. 839 (N.D. Ill. 1971); *Stout v. Hendricks*, 235 F. Supp. 556 (S.D. Ind. 1964).

QUESTIONS PRESENTED

I. WHETHER OR NOT THE MAJORITY ERRED IN REQUIRING THE STATE TO PROVE THAT A 7.7% POPULATION DEVIATION WAS NECESSARY TO COMPLY WITH STATE POLICY.

II. WHETHER OR NOT THE MAJORITY ERRED BY ADOPTING A PLAN WHICH FRUSTRATES STATE POLICY OVER AN EXISTING PLAN WHICH SATISFIES STATE POLICY AND ENTAILS ONLY A MINIMAL POPULATION DEVIATION.

III. WHETHER OR NOT THE MAJORITY ERRED IN FAILING TO BALANCE THE EQUITIES IN THE CONTROVERSY.

IV. WHETHER OR NOT THE MAJORITY ABUSED ITS DISCRETION BY ORDERING A REMEDY BEYOND THE NATURE OF ANY CONSTITUTIONAL VIOLATION.

STATEMENT

This litigation has been before the United States Supreme Court on three prior occasions. The first round of the litigation began in 1971 with consolidated cases challenging the validity of all House and Senate legislative districts in the State of Texas as drawn by the Texas Legislative Redistricting Board. The three-judge federal district court sustained the reapportionment plan for the Texas Senate but held that the plan for the House of Representatives contained deviations of population equality and two multi-member districts that were constitutionally invalid. *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972). On June 18, 1973, the United States Supreme Court affirmed the lower

court's holding regarding the constitutionality of the Senate reapportionment plan and the unconstitutionality of the two multi-member House of Representative districts, but remanded "for dismissal if the case is or becomes moot." *White v. Regester*, 422 U.S. 935, 936 (1975).[1]

Following remand of this case, the Texas legislative reapportionment act in question, H.B. 1097, 1975 Tex. Gen. Laws, 64th Leg., ch. 727, p. 2356, was submitted to the United States Justice Department for approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. On January 23, 1976, the United States Attorney General made known his objections to those portions of H.B. 1097 prescribing single-member districts for Tarrant, Nueces and Jefferson counties, thus rendering those portions of H.B. 1097 ineffective. On February 9, 1976, only shortly before April 3, 1976, state elections, the three-judge panel in this case convened and by orders issued on February 9, 1976, and February 19, 1976, declared this suit moot with regard to six of the nine districts in question as a result of H.B. 1097 and adopted single-member district plans for the three counties in which the provisions of H.B. 1097 did not take effect due to the objections of the U.S. Attorney General. Two of the plans, those for Nueces and Jefferson counties, were adopted as final plans with the agreement of the parties. The three judge panel adopted a plan offered on behalf of the State for Tarrant County, but retained jurisdiction of the plan:

[1]Steven C. Oaks, as Secretary of State, is the chief election officer of the State of Texas and Dolph Briscoe, Governor of the State of Texas, is the chief executive officer of the State. Until his resignation on October 17, 1977, Mark W. White, Jr., was Secretary of State of Texas and, therefore his name appears on earlier pleadings of this case as a Defendant. Steven C. Oaks took the oath of office as Secretary of State on November 7, 1977.

> Thus, the court retains jurisdiction of this action with respect to Tarrant County for possible further consideration after the 1976 elections. Upon motion of the plaintiffs or intervenors, subsequent to the elections, that the districting plan hereby adopted does not give fully adequate relief for the constitutional deprivations suffered by the minority communities in Tarrant County, the Court will consider setting another hearing, for the purpose of granting further relief if such is warranted.

Graves v. Barnes, 408 F. Supp. 1050, 1054 (W.D. Tex. 1976)

Plaintiffs Escalante, et al, sought a stay of the order of the three judge panel. On March 1, 1976, after having referred the matter to the full Court, Justice Powell denied Plaintiffs' application for stay.

Primary and general elections for 1976 were held pursuant to the 1976 plan. Nine state representatives were elected from the legislative districts of Tarrant County. These representatives were members of the Texas Legislature when it convened in January, 1977. During the session, no bill was introduced to reapportion the legislative districts of Tarrant, Nueces, or Jefferson counties. The Legislature adjourned on May 31, 1977. The lower court notified Defendants on June 29, 1977, that a final hearing would be held in this matter on July 12, 1977. On July 11, 1977, the first day of a special session called on school finance, the Texas Legislature passed resolutions calling for the court to make the 1976 plan final and setting forth the reasons for such action. On July 12, 1977, the final hearing was postponed until September 7, 1977.

The three-judge district court held a final hearing concerning Tarrant County on September 7 and 8, 1977. Both Plaintiffs and Defendants submitted evidence

regarding the impact of the 1976 reapportionment plan on minority access to the election process. Defendant urged the Court to retain the 1976 reapportionment plan, which had been submitted to the Court on behalf of the State at the 1976 hearing. Plaintiffs urged adoption of a new reapportionment plan similar to one adopted by the Court in 1974. In an opinion dated October 31, 1977, the majority of the three-judge court found that the 1976 plan provided minorities equal access to the election process, but nevertheless adopted the plan offered by the Plaintiffs due to its lower population deviation. Judge John Wood dissented in an opinion issued November 3, 1977. On November 10, 1977, the Court entered an order adopting the new plan. It is this order from which Petitioners seek relief.

ARGUMENT AND AUTHORITIES

I.

BY FAILING TO GIVE DEFERENCE TO THE EXISTING PLAN AS THAT WITH THE IMPRIMATUR OF THE TEXAS LEGISLATURE AND OTHER POLITICAL BODIES, THE MAJORITY ERRED IN ORDERING THE INSTITUTION OF A NEW PLAN.

The majority below erred by choosing to ignore all indicia of governmental support for the plan presented by the state and adopted as constitutional by the Court in 1976.[1] The majority of the court made no effort to reconcile requirements of the Constitution with legitimate state purposes, but instead brushed aside all

[1]For purposes of clarity, Petitioners will refer to the Plan offered by the State and adopted by the court on February 19, 1976, as the "1976 Plan" and the plan offered by Plaintiffs and adopted by the court on October 31, 1977, as the "1977 Plan."

state policy and interests by adopting the only plan before the court that had no basis in any legislative enactment and that failed to preserve existing voting precincts or the core of existing legislative districts. Despite the 1976 plan's correspondence to the legislative apportionment contained in House Bill 1097, its support by local and statewide elected bodies, and its service of legitimate state goals, the majority decided that the 1976 plan was not entitled to "indulgent review" and ordered the adoption of a new, 1977 plan, solely by virtue of that new plan's lower population deviations.

The 1976 plan was entitled to deference as one which has the imprimatur of the Texas Legislature and other political bodies. It was offered by the Attorney General of Texas on behalf of the Secretary of State and Governor of Texas. The plan was drawn and backed by the Tarrant County legislative delegation in an effort to overcome the objections raised by the U.S. Attorney General to the districts drawn in H.B. 1097, while retaining, to the extent possible, the state policy and district configurations contained in H.B. 1097.[2] There is no dispute that the plan retains three districts unchanged from H.B. 1097, while making only minor changes in others. *See Graves v. Barnes*, 408 F. Supp. 1050, 1054 (W.D. Tex. 1976); Majority Opinion (App. at 8).

Under this Court's holding in *White v. Weiser*, 412 U.S. 783 (1973), the similarity of the 1976 plan to H.B. 1097, coupled with the minor nature of the plan's

[2]The 1976 plan was developed after meetings with leaders of the Black and Mexican-American communities. The plan satisfied the objections of the Justice Department by establishing two districts of minority concentration, *Graves v. Barnes*, 408 F. Supp. 1050, 1051, n. 3, 1052 (1976), and has proven effective in providing minority access to the election process. Majority Opinion (App. at 13-15, 17).

population variation, mandates its adoption.[3] In overruling the trial court's rejection of a plan which "adhered to the basic district configurations" found in a statute properly held unconstitutional, this Court stated:

> a federal district court . . . should follow the policies and preferences of the State, as expressed . . . in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution . . . . In choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.' . . . Here those [political] decisions were made by the legislature in pursuit of what were deemed important state interests. Its decisions should not be unnecessarily put aside . . . .

Id. 795-96. Quite simply, when deciding between a 2% deviation and a 7.7% deviation, "the District Court's preferences do not override whatever state goals were embodied in [H.B. 1097] and, derivatively, in [the 1976 plan]." *White v. Weiser, supra* at 796.

Apportionment plans derived from legislation as well as those apportionments actually enacted by state

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[3]The majority's statement that "it is an unlikely argument - to proclaim as virtue a kinship with that which was riddled with vice" is directly contrary to the holding in *Weiser* and ignores the majority's own findings that the 1976 plan remedied the objectionable features of H.B. 1097. *See* n. 2, *supra.*

legislatures are entitled to judicial preference and indulgence. The contrary view of the majority below is directly counter to *White v. Weiser* and also is contrary to consistent rulings of the 5th Circuit, of which Texas is a part. *Perry v. City of Opelousas,* 515 F.2d 639 (5th Cir. 1975); *Wallace v. House,* 515 F.2d 619 (5th Cir. 1975), *remanded* 425 U.S. 947 (1976).[4]

In addition to the correspondence of the 1976 plan with H.B. 1097, as noted by Judge Wood in his dissent below:

> Not only does the State plan which was adopted as the Court Plan in our earlier decision now have the State's legislative and executive imprimatur, but also enjoys the stamp of approval of all the democratically elected City Council and other local governmental bodies within the County of Tarrant as well as the imprimatur of this Court and the Supreme Court.

(App. at 29, 34). The 1976 plan was approved *sub silento* by the Texas Legislature when it met in regular session from January through May of 1977.[5] To resolve any doubts, both houses of the Legislature passed resolutions during a special session called on school

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[4]On remand, the court in *Wallace* held that no deference is due a state's policy for multi-member districts, 538 F.2d 1138 (5th Cir. 1976), but the strong policy against multi-member districts clearly distinguishes that holding from one involving the configuration of single member districts. *See Chapman v. Meier,* 420 U.S. 1, 20-21 (1975).

[5]No legislative reapportionment bill was introduced during the session. The court ordered plans for Nueces and Jefferson counties also were left undisturbed. The Legislature had received no direction from the lower court that action on its part would be necessary to perpetuate the existent apportionments. (Wood, J., dissenting) (App. at 33).

finance calling on the court to make the 1976 plan permanent and setting out the reasons for such action. (App. at 61, 65). Furthermore, similar resolutions were passed by the city council of Arlington (App. at 68) and the Tarrant County Mayors Council (App. at 70), which consists of the Mayors from the 31 municipalities in Tarrant County. Witnesses from Tarrant County government testified to the adverse impact adoption of the new plan would have on their election responsibilities. When a constitutional plan that has been tested through application to primary and general elections is endowed with such widespread and unanimous support from the political bodies of a state, it is clearly entitled to judicial deference, for those bodies are

> by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality.

Connor v. Finch, 431 U.S. 407, 415 (1977); *see also Gaffney v. Cummings*, 412 U.S. 735, 749, 754 (1973).

The majority below, without explanation, summarily refused to give effect to the views of these state and local officials since "mere endorsement of the plan adopted in this court" does not entail "a studied and thoughtful approach to the process of legislative apportionment." (App. at 9).[6] Concerning this unsupported conclusion of the majority, Texas can do no better than refer to the dissent of Judge Wood in his address to the contention that all of the elected officials

> are guided in their official acts in petitioning this Court for approval of the present Court

[6]This criticism is quite similar to that by the same judges in *Graves v. Barnes*, 343 F. Supp. 704, 717 (W.D. Tex. 1972), which was "obviously rejected" by the Supreme Court. (Wood, J., dissenting) (App. at 35-36).

> adopted plan by motivies of discrimination or are in the habit of adopting official resolutions or acts without appropriate study, conception or consideration. I refuse to make sure an outrageous assumption and I respectfully submit further that the endorsement by all of these bodies who are vitally concerned with this reapportionment problem refutes the contention of the majority that there was a failure to conduct 'a studied and thoughtful approach to the process of legislative apportionment.'

(App. at 34-35). The majority's view is directly contrary to the established presumption that state officials perform their duties knowledgeably and in good faith. *Barnes v. City of Gadsden*, 174 F. Supp. 64 (N.D. Ala. 1958), *aff'd.* 268 F.2d 593 (5th Cir. 1959), *cert. denied*, 361 U.S. 915 (1959); 63 AM. JUR. 2d, *Public Officers and Employees*, §539.

Accordingly, since the 1976 plan involves a deviation of only 7.7% and is the plan unanimously endorsed by the pertinent political bodies as furthering legitimate state policies, it should have been made permanent by the court below without any further showing by Defendants. *Connor v. Finch*, *supra* at 418; *White v. Regester*, *supra* at 674; *Gaffney v. Cummings*, *supra*. The "fact that another plan [was] conceived with lower deviations," *Gaffney v. Cummings*, *supra* at 741, did not provide the District Court with authority to impose its preferences over the state goals embodied in the 1976 plan. *See White v. Weiser*, *supra*.

II.

BY FAILING TO GIVE LEGITIMATE STATE POLICIES PROPER CONSIDERATION, THE MAJORITY ERRED IN ADOPTING A PLAN WHICH DOES VIOLENCE TO THOSE POLICIES.

Having determined that the 1976 plan was not entitled to deference as the state plan, the majority below purportedly applied what it termed "the Court's new relativist test" and compared "the efficacy of each [plan] in accomplishing legitimate state policy," citing *Chapman v. Meier*, 420 U.S. 1 (1975) and *Connor v. Finch, supra*. (App. at 19). The majority formulated its test from a quote taken out of context from *Connor v. Finch, supra*. Then, rather than comparing the relative compliance of the two plans with state policy, the majority misapplied its own announced formula by failing to give consideration to the state policy it found in the existing plan. Instead, it selected a plan that totally frustrated state policy over a statistically satisfactory plan that had been in use for almost two years.

The majority announced its new test as follows:

> [T]he new guidance we gain from *Connor* is that considerations of state policy that result in a statistically offensive plan 'cannot be viewed as controlling and persuasive when other, less statistically offensive, plans already devised are feasible [citations omitted].' *Connor, supra* [at 420].

(App. at 19). Initially, even admitting the validity of the majority's test, it is clear that it does not properly apply to the instant case since a 7.7% deviation is not "statistically offensive." No court has found such a deviation to be impermissible in any plan, legislative or

court ordered. In reversing this same majority's holding that other state representative districts in Texas were unconstitutional because of a population deviation of 9.9%, this Court said:

> For the reasons set out in *Gaffney v. Cummings, supra*, we do not consider relatively minor deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation. Those reasons are as applicable to Texas as they are to Connecticut; and we cannot glean an equal protection violation from the single fact that two legis|ative districts in Texas differ from one another as much as 9.9%, when compared to the ideal district.

White v. Regester, supra at 764. In *Chapman* and *Connor* this Court was dealing with court ordered plans with respective deviations of 20.14% and 19.3%. The 7.7% population deviation in the instant case is simply not comparable to those figures. This Court has termed a population variance of 7.83% "insignificant," *Gaffney v. Cummings, supra* at 748, and one of 16.4% "relatively minor," *Mahan v. Howell*, 410 U.S. 315, 329 (1973). One member of this Court has construed its holdings to establish that "[d]eviations no greater than 8% are . . . to be deemed de minimus." *White v. Regester, supra* at 775 (opinion of Brennan, J.). Lower courts have approved plans with similar deviations. *E.g. Perry v. City of Opelousas*, 515 F.2d 639 (5th Cir. 1975) (6.2%); *Chapman v. Meier*, 407 F. Supp. 649 (D.N.D. 1975), on remand from 420 U.S. 1 (1975) (6.6%). The same three

judge court below unanimously approved reapportionment plans for legislative districts in Jefferson County and Nueces County which entailed deviations of 8.1% and 10% respectively. Thus by its own test, the majority below should not have even sought to apply its "relativist approach."

Furthermore, the language in *Connor* relied upon by the majority below was taken from *Chapman v. Meier, supra* at 26. In *Connor* the Court was referring to an alternative plan "that served the state policy . . . better than did the plan the court ultimately adopted," 431 U.S. at 420, and in *Chapman* to a plan that equally satisfied the state's policy, 420 U.S. at 25. By contrast, the majority below applied the language to an alternative plan that totally frustrated the state's policies. While paying lip service to a "relativist approach," the majority failed completely to compare the relative merits of the two plans from the viewpoint of state policy.

This Court has consistently recognized the legitimate state policy in maintaining the integrity of political subdivision lines. This policy is based in part upon the desire "of insuring some voice to political subdivisions, as political subdivisions." *Mahan v. Howell, supra* at 321, citing *Reynolds v. Sims, supra* at 580-81. *See also Connor v. Finch, supra* at 420; *Chapman v. Meier, supra* at 25. The relative superiority of the 1976 plan[7] in this

[7]The majority below placed emphasis on its conclusion that the 1977 plan "interrupts city coundaries slightly *fewer* times" than the 1976 plan. Majority Opinion (App. at 19) [emphasis supplied by the court]. The testimony relied on by the majority was the statement of Plaintiffs' witness that the 1976 plan cut city coundaries 34 times whereas the 1977 plan cut city boundaries 28 times. The State of Texas disputes these figures. However, even conceding the accuracy of the figures, the majority failed to acknowledge that all but six of the interruptions of city boundaries occurred between (continued on next page)

respect is demonstrated by the resolution of the Arlington City Council (App. at 68), which states in part that the 1977 plan would dilute the representation of that city. Similarly, the mayors of the many small communities in Tarrant County voiced their almost unanimous support for retention of the 1976 plan. (App. at 70). Furthermore, the majority below did not discuss the impact of the 1977 plan on the integrity of the city council district lines in the City of Fort Worth. (App. at 71). At the time of hearing in this matter, the State of Texas was unaware of the 1977 plan's adverse impact on the Fort Worth Independent School District. This impact was described by school district officials in an affidavit attached as an Appendix to Petitioner's Supplement to Application for Stay in this case.

A clear difference between the two plans in maintaining the integrity of political subdivision lines is apparent in the effect on voting precinct lines. It is undisputed that the 1977 plan will affect the integrity of between 70 and 100 voting precincts in Tarrant County

H.B. 1097 and the 1976 plan in the effort to meet Justice Department objections to H.B. 1097 by drafting a plan before the February, 1976, hearing. In addition, the Plaintiff's figures fail to reflect that the 1977 plan cuts the City of Fort Worth multiple times and makes no effort to respect its boundaries or core areas, while H.B. 1097 and the 1976 plan do not divide the City of Fort Worth in such a manner and are drawn in an effort to maintain the City's boundaries and core areas. With regard to the many smaller communities in Tarrant County, the majority failed to acknowledge the clear statement of preference by the mayors of those communities that the 1976 plan should be left in place. (App. at 70). Although the 1976 plan cut the boundaries of many of these smaller communities, the adverse effects of such a result have been ameliorated by the actions of Tarrant County in redrawing its precinct lines to accomodate city boundaries. Adoption of the 1977 plan, which would cut city boundaries again, but in different places, would only aggrevate the problem and require a new redrawing of precinct lines.

while retention of the 1976 plan would allow voting precincts to remain intact.[8] This Court previously has recognized the legitimacy of using voting precincts as the basis for drawing legislative districts. *Connor v. Finch, supra* at 424. A state may legitimately prefer to utilize the same voting precincts in all elections. *Id.* Otherwise the difficulties entailed by an election involving several different governmental bodies would be insurmountable; a state would be forced to hold separate elections for each governmental body for which voting precincts differ. It would be impossible for each voter to use the same polling place for each election. The attendant confusion of the voters, which would inevitably lead to reduced participation, is obvious.

Even the majority below acknowledges that the state policy of maintaining compact and contiguous districts is frustrated by the court's new 1977 plan. (App. at 21). States have a legitimate interest in maintaining compact and contiguous districts. *See Connor v. Finch, supra* at 422, 425; *Reynolds v. Sims, supra* at 518. An examination of the plats on the two plans allows one quickly to discern that the 1977 plan adopted by the majority constitutes a gerrymandering of urban, surburban, and rural areas into a crazy quilt assortment of non-compact districts,[9] whereas the 1976 plan establishes reasonably compact districts. *Compare* 1977 plan (App. at 60) *with* 1976 plan (App. at 59).

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[8]A variation of the 1976 plan which was offered by the state would leave voting precincts intact but would reduce the population deviation to 5.8%.

[9]Until Defendants pointed the matter out to Plaintiffs shortly before the September 7, 1977, hearing, the Plaintiffs' plan, through errors in its legal description, actually had a population deviation of over 15% and had some census tracts displaced from the district in which Plaintiffs intended them. As Plaintiffs' attorney explained to the court below: "we've always talked about what a contiguous district was. We found out we didn't have one, didn't we?" (Transcript, p. 451).

In the same vein, the 1977 plan is greatly inferior to the 1976 plan with respect to the preservation of communities of interest. In *Mahan v. Howell, supra*, this Court reversed a lower court decision which split counties to the effect that "[t]he opportunity of its voters to champion local legislation . . . is virtually nil." *Id.* at 324. Since many legislative disputes are upon urban-surburban-rural lines, a state has a clearly legitimate interest in preferring apportionments which provide for distinct representation of such areas. *See Reynolds v. Sims, supra* at 567, n. 43.

The 1976 plan met the objective of preserving communities of interest. Districts 32-A and 32-B, and the eastern portion of District 32-G are retained unchanged from H.B. 1097 and represents a single community of interest centered around the City of Arlington.[10] District 32-F represents a single community of interest commonly and historically known as the "northside" of the City of Fort Worth. District 32-F, 32-I and 32-H constitute the central core of the City of Fort Worth. District 32-E combines the northern rural and suburban areas of the county, including between 17 and 21 small incorporated cities, a community of interest recognized by H.B. 1097. District 32-C, retained unchanged from H.B. 1097, consists of a rapid growth area in south Tarrant County. District 32-D, which was retained from H.B. 1097 with only the change of one census tract, is an area that historically has been separated as a result of inaccessibility from other areas to the north and south. By contrast, the 1977 plan does not maintain any of these communities of interest; instead, it combines urban, surburban and rural areas

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[10]The Arlington City Council resolved that the city's representation would be diluted by the 1977 plan. (App. at 68).

into the same districts.[11]

Yet another deficiency in the 1977 plan is that of minority representation. That plan places the bulk of Mexican-American voters in a district which is 49.3% black and only 22.2% Mexican-American. *Graves v. Barnes*, 408 F. Supp. at 1052. The secondary minority district is 38.9% black and 3.6% Mexican-American. The 1976 plan effectively provides better representation for Mexican-Americans; its primary district is 60.3% black and 3.8% Mexican-American, its secondary district 25.28% black and 19.35% Mexican-American. *Graves v. Barnes*, 408 F. Supp. at 1052. Whereas a minority candidate could carry either district in the 1977 plan by appealing only to blacks, it is unlikely that he could do so in the secondary district of the 1976 plan. Furthermore, this district includes the primary area of Mexican-American growth in Tarrant County. District 32-F of the 1976 plan provides an opportunity for equal access to the election process for Mexican-Americans, Blacks and Anglos in the District because no candidate could

[11]An examination of the map of the 1977 plan quickly discloses this fact. (App. at 60). For example, District 32-F of that plan reaches from the outer boundaries of Tarrant County down to the very center of Fort Worth, needlessly including the numerous small communities and rural area of north Tarrant County with the urban core of the City of Fort Worth. Districts 32-G, 32-B, 32-I, and 32-G of the 1977 plan also have the same needless combination of urban, suburban and rural interest. However, no District is as extraordinary as District 32-C which reaches from the far north part of rural Tarrant County through the City of Fort Worth down to the southern boundary of the entire area and then extends by a narrow elongation out to reach the eastern boundary of the county. This elongation was added by Plaintiffs when their plan was changed at the last minute before the 1977 hearing and further shattered the community of interest previously recognized in the Resolution of the City Council of Arlington. (App. at 68).

prevail without appealing to an assortment of interests. The 1976 plan better provides for Mexican-American access to the election process than does the 1977 plan.

The 1976 plan has proven effective in providing representation of minorities. Under that plan the voters have elected one black representative and two anglo representatives, Ms. Miller and Mr. Willis, who are sensitive to minority interests and have strong minority support. Majority Opinion (App. at 13-15). After noting the strong support of minorities for Representative Miller, whose District 32-I is 15.2% minority, the majority below adopted a plan which pairs her with another incumbent in an essentially high-income, conservative district. Similarly, Representative Willis is transferred from an urban and working class district to a rural district. Representative Leonard Briscoe, a black representative, was shifted from a district of 64% minority to one of 44% minority. Thus in place of a plan which has proven effective for minority representation, the majority below adopted the 1977 plan, the effectiveness of which is speculative and apparently inferior.

The pairing of incumbents is the rule of the 1977 plan. Whereas the continuation of the 1976 plan would pair no incumbents, the 1977 plan would result in the pairing of six of the nine representatives of Tarrant County. The preservation of member-constituent relationships is a legitimate state policy which enhances the representation of the voters by preserving the seniority of their elected representatives. *See White v. Weiser, supra* at 791; *Gaffney v. Cummings, supra* at 754; *Taylor v. McKeithen*, 407 U.S. 191 (1972); *Burns v. Richardson*, 384 U.S. 73, 89 n. 16 (1966). The importance of this member-constituent relationship is particularly important when the members are ones elected from a single-member constituency. Thus the 1977 plan fails in

yet another respect to comply with state policy as reflected in House Bill 1097 and effectuated under the 1976 plan.

The majority acknowledges that adoption of the 1977 plan, after the 1976 plan has been utilized for all elections since February, 1976, will effect a disruption of the election process with resulting voter confusion, voter apathy and inconvenience to election officers. (App. at 21-22). The court discards these effects as only "pragmatic rationale" that do not demonstrate the merits of one proposal over another. Such a conclusion is startling in view of the recognized purpose of drawing legislative districts on the basis of population equality to assure each voter effective participation in the election process. Over a period of six months following the 1976 general election, officials of Tarrant County worked through a series of public meetings and other opportunities for public participation to redraw election precinct lines to comply with state law and to overcome the confusion occasioned by lines hastily drawn for 1976 elections after the court's 1976 decision. Adoption of a new plan will occasion further and needless district, precinct, polling place and voter registration changes and resulting voter confusion and apathy. The prospect of voter confusion for 1978 elections was substantial considering the limited time available for local officials to implement the 1977 plan prior to those elections. This immediate adverse impact was avoided when Mr. Justice Powell stayed the majority's 1977 order pending appeal. However, even the implementation of such changes in 1979 for 1980 elections will constitute an unnecessary intrusion into the state's election process with the prospect of resulting confusion and apathy among Tarrant County voters who would have been whipsawed between a variety of anticipated and actual election plans over the past seven years. What merit can be found in reducing an acceptable population deviation

figure among districts to a purportedly lower one when the practical result is to adversely impact the entire election process in a manner that disenfranchises the voters?

Once an apportionment plan is in effect, whether by legislative enactment or court order, and state officials implement it by drawing precincts, registering voters, designating polling places, selecting precinct officers and carrying out elections according to the plan, the state and political subdivisions have a legitimate interest in maintaining the plan and preventing further disruption of the election process by additional unnecessary intrusions by the federal courts. This is not to suggest that such an interest is sufficient to justify a denial of constitutional rights, but it is and must be an interest sufficient to prevent the vascillations of a federal court in the exercise of its equitable discretion. The 1976 plan was expressly held to be constitutional by all three of the judges of the court below. *Graves v. Barnes*, 408 F. Supp. 1050. It was imposed to assure minority access to the election process and has been found by all three judges to in fact accomplish that purpose. The majority's adoption of a new plan in 1977 and dismissal of the state's interest in the integrity of its election process as a "pragmatic rationale" unrelated to the merits of the plans being considered is a further indication of the majority's disregard for legitimate state goals and misapplication of its own "relativist approach" to judging the merits of the plans before it.

Accordingly, even were the 1976 plan not entitled to deference as the state plan, it should have been adopted by the lower court as that plan most closely conforming to legitimate state policies without involving substantial population deviations. The view of the majority below that the burden is on the state "to articulate clearly the relationship between the variance and the state policy

furthered" originates from another quote taken out of context from *Chapman*. The Court in *Chapman* was addressing the justification of a 20% deviation. To apply such a painstaking review to a plan with only a 7.7% deviation is to place an immense burden upon the state in order to avoid the total frustration of state policies at the hands of district courts acting not in pursuance of constitutional requirements, but only in the purported furtherance of guidelines laid down by this Court in its supervisory function. In all fairness to states which find themselves subject to the broad apportionment powers of the federal courts, the stringent requirement of *Chapman* must be kept in context and applied only to a "population deviation of that magnitude" and only where another plan is available which apparently demonstrates that obedience to state policy does not prevent "attaining a significantly lower population variance." *Id.* at 25.

Even under such an unjustified application of the extremely stringent review implemented by the majority below, the 1976 plan should have been adopted. The preservation of voting precinct lines clearly results in the population deviation in this case.[12] Furthermore, the fact that no plan has been constructed which adheres to state policy and offers a deviation lower than that proposed by the State is a clear indication that the policy leads to the minor deviation in this case. *Cf. Connor v. Finch, supra; Chapman v. Meier, supra.*

[12]*See* n. 8, *supra.*

III.

THE MAJORITY BELOW FAILED TO CONSIDER BASIC EQUITABLE PRINCIPLES AND THEREBY ERRED IN ADOPTING THE 1977 PLAN.

In its choice of the 1977 plan, the majority below did not even attempt to consider the equities involved. Ignoring its earlier holding that the 1976 plan was constitutional, *Graves v. Barnes*, 408 F. Supp. 1050, the majority felt that it was asked "to ignore constitutional norms in the name of convenience and administrative inertia." (App. at 22). Since the 7.7% deviation in the 1976 plan is clearly constitutional, the court below was asked only to adopt a plan which *may* entail a marginally higher deviation out of consideration for the equities involved.

> The courts are bound to apply equitable considerations and in *Reynolds* it was stated that '[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws . . . . *Ibid.*

Mahan v. Howell, supra at 332.

This is but an application of the general rules involving the propriety of injunctive relief. An injunction will issue "only . . . when both the right and the wrong claimed are clear . . . ," *Sharp v. Lucky*, 266 F.2d 342, 343 (5th Cir. 1959), and only after a

> . . . balancing of the interests of the parties who might be affected by the court's decision—the hardship on plaintiff if relief is denied as opposed to the hardship on defendant if it is granted . . . .

WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, *Civil* §2942, p. 366-67. "There must be more than a mere possibility or fear that the injury will occur." *Id.* at 369.

The equities in this case are overwhelmingly against adoption of a new apportionment plan for Tarrant County. Initially, there is no assurance that the claimed deviations in the two plans are accurate; the 1976 plan may in fact provide lower deviations than the 1977 plan. The utility of 1970 population figures to compute 1978 deviations is limited. Even at the time a census is taken, "the 'population' of a legislative district is just not that knowable to be used for such refined judgments" as that between a 2% and 7.7% deviation. *Gaffney v. Cummings, supra* at 746. Furthermore, the total population "may not actually reflect that body of voters whose votes must be counted and weighed for purposes of reapportionment . . . ." *Id.* at 746. The matter "is complicated by the recognition that major shifts in population and in voting precinct lines have occurred since the 1970 census . . . ." *Connor v. Finch, supra* at 416, n. 13.[13] Finally, the majority's stringent application of the principle of population equality to the nine legislative districts in Tarrant County was in avoidance of the reality that the nine districts constitute only a small fraction of the 150 total state representative districts. Regardless of whether Tarrant County legislators are elected under the 1976 plan or 1977 plan, the people of Tarrant County will find themselves in districts with a population both greater and smaller than some of the other 141 state legislative districts.

[13]Similarly, the majority has recognized that population shifts since 1970 suggest that the deviation in the 1977 plan may be understated. *Graves v. Barnes*, 408 F. Supp. at 1053 n.7.

The majority below noted that insufficient evidence had been presented on the question of population to permit such refined judgments, *Graves v. Barnes*, 408 F. Supp. at 1053, but without the introduction of any further evidence[14] on the point proceeded two years later to make such a judgment. This action constituted an abuse of discretion for there was no clear showing of a wrong inflicted by the 1976 plan, much less the presentation of a "case reasonably free from doubt" upon which to base injunctive relief by a federal court against state officers. *Massachusetts State Grange v. Benton*, 272 U.S. 525, 527 (1926).

Although the lack of any clear advantages to the majority's decision is enough to require its reversal, that result is even more clearly mandated when the adverse effects upon the State are examined. As noted above, voter confusion and disenfranchisement are "severe problems occasioned for the citizens" of Tarrant county by the massacre of voting precincts and existing district lines. *Chapman v. Meier, supra* at 26. The member-constituent relationships would be destroyed. Pursuant to state law new election precincts would have to be drawn, new polling places established and many voters re-registered. *See Reynolds v. Sims, supra* at 585. The districts of the City Council of the City of Fort Worth and the Board of Trustees of the Fort Worth Independent School District would have to be reapportioned. Finally, adequate minority representation would be jeopardized and other legitimate state policies frustrated.

[14]Plaintiffs below did introduce a study intended to show certain population changes among certain census tracts in Tarrant County. The report was offered for purposes of showing the movement of minorities in Tarrant County and did not purport to show population increases or decreases even for the small area surveyed. The majority of the court below found that the report did not offer the high degree of accuracy required. Majority Opinion (App. at 16).

In exchange for this considerable expenditure of local tax money, the abundant confusion of the voting public, and the frustration of state policy, Tarrant County would have an apportionment plan for a maximum of three years[15] which cannot with any degree of certainty be said to reduce the population variation. This Court in *Connor v. Finch* and *Chapman v. Meier* could not have intended this result; otherwise every court ordered plan in the United States would be subject to challenge upon the development of one of supposedly lower population deviations. Such a persistent review of existing apportionment plans, including that by the majority below, conflict with this Court's holding in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

> For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy. . . .

Id. at 436-37. There is no meaningful distinction in this context between the implementation of a redistricting plan for school attendance and one for legislative elections. In either instance the work of a federal court is completed when constitutional violations have been remedied. Since the 1976 plan constituted an adequate remedy, the "District Court had fully performed its function" and the majority below abused its discretion in attempting to exercise its equitable jurisdiction for further relief not required by the Constitution.

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[15]Reapportionment will be necessary after the 1980 census. Tex. Const., art. III, §28; *See Reynolds v. Sims, supra.*

CONCLUSION

This case is one that has been before this Court before. On two prior occasions, Appellants have felt compelled to appeal from the reapportionment decision of the majority of the Court below. On each occasion this Court has heard our appeal. It is with reluctance that Appellants return to take the time of the United States Supreme Court and prolong the litigation. Until the majority of the court in its recent order struck down the existing single member district scheme for Tarrant County, it appeared that the seven year old controversy had finally been resolved. Now, however, for the reasons set out in this Jurisdictional Statement and in the dissenting opinion filed by Judge John H. Wood in the court below, and due to the majority's "perpetual unconstitutional intrusion in and usurpation of those democratic processes . . . reserved . . . to all of the sovereign States," (Wood, J., dissenting) (App. at 37), Appellants are compelled to appeal yet a third time from a decision of that majority. The case raises unique questions of law requiring answers by this Court.

WHEREFORE, PREMISES CONSIDERED, Appellants pray that this Honorable Court note probable jurisdiction of this case, reverse the decision of the majority below, and order the district court to enter the 1976 plan as the permanent apportionment of state representative districts for former multi-member district 32, or, in the alternative, that this Honorable Court note probable jurisdiction of this case and set it for argument and plenary consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Steve Bickerstaff, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Appellants. I do hereby certify that three copies of the foregoing Jurisdictional Statement have been served by placing same in the United States Mail, First Class, Certified and Postage Prepaid, on this the 20th day of January, 1978, addressed to each of the following:

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